Supreme Court, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MICHELLE LA NETTE NUNLEY
Petitioner,

vs.

CITY OF LOS ANGELES AND DARYL GATES

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

1. Under what circumstances is it permissible for a police officer to cause or permit a dog to mutilate a person?

LIST OF PARTIES

Petitioner Michelle La Nette Nunley was plaintiff and appellant in the courts below. Respondents City of Los Angeles and City of Los Angeles Chief of Police Daryl Gates were the defendants and appellees in the courts below.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

MICHELLE LA NETTE NUNLEY,

Petitioner,

vs.

CITY OF LOS ANGELES and DARYL GATES,

Respondents.

Petitioner Michelle La Nette Nunley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on July 31, 1997.

OPINIONS BELOW

The decision of the court of appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. The decision by the District Court for the Central District of California was not reported. A copy appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on July 31, 1997. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 11, 1997. Apx. B-1. This petition for certiorari was filed December 10, 1997, within 90 days of September 11, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Proceedings Below

Petitioner Michelle La Nette Nunley sued defendants City of Los Angeles and City of Los Angeles Chief of Police Daryl Gates, alleging, *inter alia*, violations of 42 U.S.C. § 1983. A jury trial resulted in a judgment for defendants. Petitioner appealed. The Ninth Circuit affirmed.

2. Statement Of Facts

This case challenged the use of a dog to attack, without warning, an unarmed, non-dangerous theft suspect, Michelle La Nette Nunley, and the use of police dogs to attack people in a racially discriminatory manner. The only defendants were the City of Los Angeles and its Chief of Police.

Police received a telephone call that two African-American men were stealing scrap from a junk yard. Exhibit 34, AER 39, RT 1-7-93 p.15. A police helicopter saw the two men, one wearing *white clothing* and the other wearing a *blue* jacket, AB (Appellee's Brief) 2, climbing over the fence from the junk yard and running away. RT 1-7-93 pm pp.80-81, AER 165-166. An LAPD dog handler, Douglas Roller, arrived and began searching the area outside the junkyard for suspects. One suspect, matching the description of the man wearing the blue jacket, was found. AER 37-38; RT 1/22/93 38:7-9. The dog then attacked and seriously injured Ms. Nunley. RT 1-8-93 pp.37-41, Exhibit 17, AER 33 (depiction of injuries). Ms. Nunley, a *female*, was wearing a *brown* jacket, and a *baseball cap* (no suspect was described as wearing any type hat). AB 4; RT 1/22/93 am 169:19, 170:1-3.

The police had no reason to believe that the suspects were

armed or in any way dangerous. RT 1-7-93 pm pp.80-81, AER 165-166. No evidence was presented that people who try to steal junk are usually armed or dangerous. Uncontradicted evidence showed that ninety-nine percent of all *felony* suspects give up. RT 1-15-93 p.73-76 (Daryl Gates).

The sergeant in charge testified that there was no reason to believe that any felony had been committed. RT 1-13-93 97-100.[1] The arresting officer knew also that he "at no time had any facts that

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[1] Sgt. Rockett testified:

> Q: Now, based on the information that you obtained rega.ding that incident, was their probable cause to believe that any person arrested on that evening committed a burglary?
> A: No.
> Q: And based on the information that you had at that time and place, was there probable cause to believe that any person committed a grand theft?
> A: No.
> ***
> Q: In order to have probable cause to believe that a person committed a burglary, you have to have facts that a person entered a structure of some type, a garage, a home, a vehicle, correct?
> A: Yes, sir.
> Q: And you had no such facts and there were no such facts; is that correct?
> A: Yes.
> Q: And in order to believe that a person has committed a grand theft, you have to have facts that a person stole something of value of more than $400; is that correct?
> A: Yes, sir.
> Q: Any you had no such facts with regard to this incident at all; isn't that true?
> A: That's true. RT 1-13-93 pp. 98-99.

any person involved in this incident had[] committed any felony." RT 1-22-93am 143:6-8. More specifically, the arresting officer testified that he had no reason to believe that anybody had taken anything valued at more that $400.00 (in California, stealing something worth less than $400 is petty theft, a misdemeanor). RT 1-22-93 142:17-19. In fact, the police *never* obtained any information that Ms. Nunley had taken *anything*. RT 1-22-93am 85:7-8. Nonetheless, the police claimed that they believed that the junkyard thieves might have committed felonies. This alleged belief was based on the assertion that it was *possible* that junk with a value exceeding $400 might have been taken, and that the call which brought them to the location, "theft," could have been *either* a petty theft or grand theft (a felony). The possibility that junk valued at more than $400 might have been taken was based on a claim that one officer had been told "on *past* occasions at *other* locations that *other* persons were *suspected* of having taken *other* metals that *may have* had a value in excess of $400." RT 1-22-93am 85:17-22 (emphasis added).

At the time that Ms. Nunley was attacked and bitten, it was not clear that she was one of the suspects. According to the dog handler, Officer Roller, he was searching with the dog, off leash, when the dog gave indications that it had found a person lying in some grass in an open, public, area on the other side of the railroad tracks from where the suspected junk thieves were seen. *See* AOB 5; RT 1-21-93 157:13-15; 159:18-24; 169:20-23; Exhibit 12; Exhibit 13; Exhibit 201. He could not see anyone. He yelled, "police," and got no response. He then sent the dog into the area. The dog attacked and bit Ms. Nunley. As it turned out, Ms. Nunley was not one of the suspects. She did not fit the description of either suspect. She was not booked for any crime connected with the suspected junk theft. (The two suspects arrested in connection with the junk theft were booked for misdemeanor trespass.)

The dog was a "find and bite" dog. The dog was not trained to find and bark. The dog was trained to bite anyone it found anywhere on the body it could gain a grip, RT 1-7-93 p.25, without command from the handler. RT 1-27-93 pp.162-163,166. The bite was a "reward" to the dog for finding a person. AER 57, 61, 63, 128.

The dog handler, Roller, in the six months before Ms. Nunley, had used the dog to assist in the arrest of 21 people. Of the 21, 17 were attacked and bitten. RT 1-7-93 pp.27-50. All received medical treatment and 8 required in-patient hospitalization. The dog had bitten in the groin, RT 1-7-93 p.26:10, head, RT 1-7-93 pp.29:20, 38:12, and broken one person's elbow. 1-22-93 am p.23.

Of the people arrested , all but one (possession of marijuana) were theft offenses. RT 1-7-93 pp.50-56; Exhibit 502.

No one was armed. RT 1-7-93 pp.66:13-77:2.

Force is normally used once in a hundred felony arrests. RT 1-15-93 p.73-76 (Gates); RT 1-12-93am pp.36-37; RT 1-12-93 pp.38-41 (from LAPD use of force data base). In 1988, when dogs were not involved, arrestees suffered minor, moderate or serious injury about one-third of the time force was used. RT 1-12-93 pp.41-42. Out of the 316,911 felons arrested by non-canine officers in 1988, 64 suffered serious injuries (required inpatient hospitalization), *i.e.*, one in 5,000. RT 1-12-93 pp.42-43. In comparison, Roller's dog in six months bit eighty-one percent of the suspects he arrested with the assistance of the dog. One hundred percent of those suffered at least moderate injury. Eight people, thirty-eight percent, required in-patient hospitalization. The chances a theft suspect arrested by regular LAPD officers would be seriously injured were less than 1 in 5,000. The chances a theft suspect arrested by Roller and his dog would require hospitalization were more than 1 in 3. An unarmed theft suspect arrested by Roller and his dog was 1,600 times more

likely to be hospitalized. If every officer in the department had a dog, one could expect the number of hospitalizations to go from 64 per year to 120,460. The fifteen dog handlers put more people in the hospital than the rest of the 8,000 members of the department put together.

The victims were minorities. Although the dog handler was free to deploy anyplace in the City, he chose to concentrate his activities in South-Central Los Angeles, the home of people who are not white. Fewer than two percent of the people bitten were white. Of the 119 people bitten by Roller's dog, all but two were African-American or Latino. AER 56. This was grossly disproportionate to the race of persons arrested for the crimes involved. Whites account for at least twenty percent of those responsible for the crimes. AER 46, 63. The Christopher Commission reported that "racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community." AER 103.

The department had no explanation for why people of color were the exclusive victims of this practice. It presented no evidence that permitting dogs to attack people enhances officer safety. Ms. Nunley presented uncontradicted evidence that this practice does not enhance officer safety. It unnecessarily endangers not only the persons against whom the attack is directed and innocent bystanders, but also the police. Siccing dogs on people provokes violence, because victims of course try to protect themselves; and it exposes officers to danger because it forces them into close proximity of the victim to break up the fight. 1/12/93 RT 33-34 (Bogardus). *See also* Exhibit 506, "Why Be a Cop?"

The district court would not permit use of a publicly aired, RT 1-14-93, p.38, RT 1-26-93 p.21, Exhibit 506, AER 126, LAPD-produced recruitment documentary, called "Why Be A Cop?" which

according to both Gates and the head of the canine unit depicted LAPD's use of dogs "accurate[ly]," RT 1-15-93 pp.88-91, in a "fair and accurate manner," RT 1-8-23pm p.21:14, AER 168, on the ground that it was "too prejudicial." RT 1-6-93 pp.74-82, AER 155-163; 1-8-93pm pp.30-38, 172-180; *see also* RT 1-26-93am p.20 (Johnson). Nor were Ms. Nunley's experts permitted to rely on LAPD's documentary about itself in formulating or explaining their opinions. RT 1-8-93pm pp.95-96, AER 181-182; 1-13-93 pp.66-67, AER 188-189. Nor would the court permit Ms. Nunley to present evidence regarding the severity of injuries actually inflicted by LAPD dogs, *e.g.*, AER 47-53, including the dog which attacked and bit Ms. Nunley. RT 1-12-93am pp.18-22; RT 1-13-93 pp.809-91; RT 1-14-93 p.54, RT 1-15-94 p.124; RT 1-28-93 p.108. Ms. Nunley was not permitted to introduce into evidence any portion of the "Christopher Commission Report," RT 1-5-93 p.144; 1-6-93 pp.5-23; 1-28-93 p.117, nor were Ms. Nunley's expert witnesses permitted to rely on it. RT 1-6-93 p.38-41.

The department's position, as articulated by its then Chief of Police Daryl Gates, was that permitting dogs to attack and bite people was not a "use of force," RT 1-15-93 p.72-73, because "the use of force policy was established for human beings," RT 1-15-93 p.77, the dog was not "an extension of the officer," RT 1-14-93 p.21, and it was the "animal that imposed the injury, not the human being," RT 1-15-93 p.92:24.[2] Nonetheless, the district court refused to

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[2] Somebody in the department, probably Gates, RT 1-14-93 p.16, waived compliance with all of the established, formal requirements for reporting and investigating uses of force and treating officers involved in serious force incidents contained in LAPD's governing rules, the LAPD Manual. RT 1-13-93, pp.75-197; RT 1-26-93 p.166; RT 1-14-93 p.69. LAPD canine unit policy was that canines were used to find and attack anyone suspected of any felony offence, whether or not there was any danger involved, because all felonies were considered dangerous by definition. RT 1-26-93 pp.109-114,

instruct that "A police dog used by a police officer is an extension of the officer. A police dog used by a police officer where there is a substantial probability that it will bite a person must be considered a use of force by the police officer," AER 215A.

Although there was substantial evidence that it was both LAPD's and Roller's[3] practice not even to give an announcement, RT 1-22-93 p.6, RT 1-19-93 p.42-43 (and additional evidence offered and rejected, Exhibit 506), the district court refused to instruct the jury in accordance with Federal Rule of Evidence 406. AER 223A. RT 2-3-93 p.15.

Over Ms. Nunley's objection, the court instructed that "[i]n determining the reasonableness of police officers' conduct, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives." Apx. A-8.

3. Ninth Circuit Opinions

A majority of the Ninth Circuit considered the use of the dog to mutilate Ms. Nunley a "close question," but concluded that there was "sufficient evidence" to find it "reasonable." Apx. A-3.

170-175, AER 204-208.

[3] Roller testified:

> Q: At the time of December 18, 1988, when confronted with circumstances like those that you were confronted with on December 18th, 1988, it was your practice, was it not, not to give an announcement before you released your dog?
> A: In a situation with no cover in an open area like that, I probably would not hve given an announcement, no. RT 1-22-93 am p. 6:8-16.

Judge Pragerson dissented, concluding that the defendants' failure to warn Ms. Nunley that "a dog would be released to seize and bite her if she failed to surrender constitutes an unreasonable use of excessive force." Apx. A-11.

The majority reasoned that causing the dog to attack Ms. Nunley was reasonable because:

- "several officers testified they feared for their safety," Apx. A-4;[4]
- there was "reason to believe that a felony was being committed," Apx. A-4;[5]
- the dog handler, although he did not announce that the dog would bite, "announced his presence,"[6] Apx. A-4;

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[4] The subjective thoughts of the arresting officer are not relevant in determining whether his actions are reasonable. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989) ("[T]he 'reasonableness' standard is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.")

[5] "[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *United States v. Hensley*, 469 U.S. 221, 230, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); *Whitely v. Warden*, 401 U.S. 560, 568, 28 L.Ed.2d 306, 313, 91 S.Ct. 1031 (1971). "[W]hile it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by other officers, 'when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness." *Remers v. Superior Court*, 2 Cal. 3d 659, 666, 87 Cal. Rptr. 202, 470 P.2d 11 (1970).

[6] Ms. Nunley disputed that there was any announcement, presented evidence that it was department policy *not* to announce,

- The attack on Ms. Nunley "lasted for merely a few seconds," Apx A-4;
- Ms. Nunley suffered "only moderate injuries," Apx. A-4.

The court concluded that "without minimizing the severity of the injuries that [the dog] was capable of inflicting, we conclude that the risk of death or serious bodily harm was not so substantial that, as a matter of law, we must view the case as one involving the use of deadly force." Apx. A-4.

The court justified the exclusion of evidence, including photographs of injuries and an LAPD-documentary on its use of dogs, on the ground that the evidence was "relevant only to the question of the constitutionality of the City's police dog policy," and therefore not relevant to the reasonableness of using the dog to attack Ms. Nunley. Apx. A-7.

The court justified the giving an instruction that "[i]n determining the reasonableness of police officers' conduct, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternative," on the ground that Ninth Circuit cases are in conflict. Apx. A-9.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide When It is Appropriate To Cause or Permit a Dog To Attack and Mutilate a Person.

Although only a small percentage of police are equipped with dogs, they account for a disproportionate number of injuries, especially serious injuries. Fifteen LAPD dog handlers seriously

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and requested an instruction (refused) that the jury could find that the department had acted in accordance with its policy.

injured as many people as the rest of the 8,000 officers combined.

The injuries inflicted by dogs are different. They always involve penetrating the skin. Scarring, sometimes quite grotesque, results. Animals attacks are especially frightening.

Severe infections are common. There is a substantial probability of vascular injuries. Body parts are sometimes bitten off. Occasionally, the dogs kill. *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

In Europe, "voracious dogs formed a part of a nobleman's equipment for hunting either animals or men." John Grier Varner and Jeannette Johnson Varner, Dogs of the Conquest (Univ. Oklahoma Press 1983) p. *xv*.

In the New World, the first recorded dogging of Indians occurred on the island of Jamaica on May 5, 1494, during the second voyage of Columbus. "The Indians fled in surprised terror, pursued by a great dog that bit them and did them much harm; for one dog against the Indians was worth ten men." Varner, *supra*, p. 5.

The dogs used by the conquistadors to subjugate the indigenous peoples were "*perro de presa* (capture dog)." Varner, *supra*, pp. *xv*, 130. The *monteria infernal* (man hunt) was common sport. *Id.*, p. *xv*. "[T]he Indian was merely another savage animal, and the dogs were trained to pursue and rip apart this human quarry with the same zest as they felt when hunting wild beasts." *Id.*, p. 193.

Dogs killed millions. Eventually the Crown intervened and ordered the dogs killed. "We are informed that in that province there are some large dogs that are fed by throwing them on Indians and permitting them to do great damage. Since it is not fitting that

anyone should possess or breed such dogs, those that are now alive should be destroyed at once." *Id.*, p. 150.

In the United States, dog were used on slaves. As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia found it necessary to specifically prohibit owners, hirers and overseers of slaves from "unnecessarily biting or tearing [slaves] with dogs." *Id.* at 724.

After the Civil War, a war crimes tribunal tried and hanged Confederate Captain Henry Wirz for his use of dogs to mutilate escaped prisoners. N.P. Chipman, *The Tragedy of Andersonville, Trial of Captain Henry Wirz -- The Prison Keeper* (1911) at 410-412, *reprinted as The Andersonville Prison Trial* (1990) ("The tracking hounds would have been sufficient to discover the prisoners, and as they are usually harmless, would have served the purpose of the pursuer and at the same time inflicted no injury upon the pursued.")

The Nazi extermination camp Treblinka is remembered in the nightmares of its few survivors not just for its gas chambers. Addicted to the infliction of human suffering, guards deployed Kommandant Franz Stangl's dog "Bari" "to attack people, and specifically their genital regions, on command" as they were herded naked down the chute to their doom at the hands of "Ivan the Terrible." Sereny, *Into That Darkness* -- An Examination of Conscience 202 (1974).[7]

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[7] The largest supplier of police dogs in the United States is Adlerhorst Kennels International, Inc., of Riverside California. "Adlerhorst" (in English, "Eagle's Nest"), was Hitler's retreat in the Bavarian Alps. W. L. Shirer, The Rise and Fall of the Third Reich p. 436 (1959). The dog in this case was imported from eastern Germany.

Courts have recognized that using animals to cause harm raises special concerns. In *Miller v. United States*, 404 F.2d 611(5th Cir. 1968), the court described using a dog to extract a confession as "subhuman and vicarious animalism." 404 F.2d at 612. In *United States v. Dicesare*, 765 F.2d 890, 901 (9th Cir. 1985) Judge Reinhardt observed that "the intrusion of these dogs is offensive to some, frightening to others, and, sadly, to at least a few, reminiscent of the ugliest types of scenes that have occurred in police states." In *People v. Black*, 23 Cal. App. 4th 667, 672, 28 Cal. Rptr. 2d 546 (1994) the defendant's conviction for injuring a police dog was reversed because the jury was not instructed that "an arrestee may use reasonable force to defend against excessive force."

Recent medical studies have shown that injuries inflicted by police dogs are far more serious than injuries from untrained dogs, K. Bradford Snyder, MD, Michael J. Pentecost, MD, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS OF EMERGENCY MEDICINE 983 (September 1990), and that the primary victims are persons of color. H. Range Hudson, MD, et al., *Law Enforcement K-9 Dog Bites: Injuries, Complications and Trends*, ANNALS OF EMERGENCY MEDICINE 637 (May 1997).

Many consider mutilation of the human body taboo. "If the body is cut or disfigured, or if it loses any of its parts, it will remain in a condition of perpetual imbalance, and the damaged person not only will become frequently ill but may be physically incomplete during the next incarnation." A. Fadiman, The Spirit Catches You And You Fall Down, p. 33 (1997).

The law of mayhem, *e.g.*, California Penal Code § 204, protects the integrity of the victim's person. The rationale of the crime is the preservation of the natural completeness and normal appearance of the human face and body. Disfiguring injuries are

considered to be very serious because they may be a daily reminder of the underlying event and of the emotional disability that frequently attends a disfiguring injury. Injuries which cause physical scarring are disfiguring injuries. *People v. Page*, 104 Cal. App. 3d 569, 578, 163 Cal. Rptr. 839, 843 (1980) (application of permanent tattoos to victim's body is mayhem); *People v. Newble*, 120 Cal. App. 3d 444, 451, 174 Cal. Rptr. 637, 640 (1981) (inflicting three inch long scar is mayhem); *People v. Keenan*, 227 Cal. App. 3d 26, 36, 277 Cal. Rptr. 687, 693 (1991).

A. The Court Should Decide Whether "Deadly Force" Includes Force Likely to Cause Serious Bodily Injury.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Court imposed limitations on when police may use "deadly force." Those limitations, if applied here, would require a finding that the force used was unreasonable.

This Court has never expressly defined "deadly force," as that term is used in *Garner*. Several Circuits have. The Sixth, Eighth, Tenth and Eleventh Circuits all have adopted the Model Penal Code definition for excessive force cases under 42 U.S.C. § 1983. *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988); *Mattis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976) (*en banc*); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985); *see also Mathis v. Parks*, 741 F.Supp. 567, 572 & n.3 (E.D.N.C. 1990).[8] The MPC includes any force causing a

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[8] As Petitioner's evidence showed, police departments have accepted the MPC and *Garner* approach in circumstances beyond force which is likely to cause death. *See also* W. Geller & M. Scott, "Deadly Force: What We Know," 23 (Police Executive Research

"substantial risk . . . of serious bodily injury." Model Penal Code § 3.11(2) (1962).

Using the Model Penal Code definition of "deadly force" would require the dog used to mutilate Ms. Nunley be considered "deadly force." Injuries requiring in-patient hospitalization are "serious." The overwhelming majority of persons, 17 of 21, were bitten; of those bitten, almost half, 8, required in-patient hospitalization.

Without saying so expressly, the Ninth Circuit in the present case essentially rejected the MPC definition. In a more recent case, the Ninth Circuit has expressly rejected the MPC definition. *Vera Cruz v. City of Escondido*, 126 F.3d 1214 (9th Cir.1997). The Ninth Circuit has thus brought itself into clear conflict with the Sixth, Eighth, Tenth and Eleventh Circuits.

In *Pruitt*, the City argued that the officer's shooting did not constitute deadly force because the officer "had not tried to kill Pruitt but, rather, shot to stop him by hitting his legs." Adopting the MPC definition, the Eleventh Circuit rejected the argument. The Eleventh Circuit found the MPC definition consistent with *Garner* and held that the officer used deadly force because he "used force capable of causing *serious physical injury*." 771 F.2d at 1479-80, n.10 (emphasis added). *Mathis* is similar. Using the MPC definition, the trial court held that "a full-force blow to the abdomen using the knee as a blunt instrument could constitute deadly force," because such

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Foundation 1992) ("[t]here is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm.") This was the policy in Los Angeles and it is the law in California. *People v. Nealis*, 223 Cal.App.3d Supp. 1, 3, 283 Cal.Rptr. 376, 378 (1991). *See Tennessee v. Garner, supra*, 471 U.S. at 16 n. 15.

force may "cause serious bodily harm." 741 F.Supp. at 572 & n.3.

Fundamentally, the Ninth Circuit misreads *Tennessee v. Garner*, which employed the MPC approach to define limits on police use of force. The Ninth Circuit's rejection of the MPC formulation because it would equate officers and criminals affects the Circuit's misunderstanding of *Tennessee v. Garner*. The world, of course, is not made up of police and "criminals."[9] Petitioner was

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[9] As the Fourth Circuit emphasized in *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), in reversing a judgment for a defendant in a police dog bite case:

> But Casella was a *criminal*. He deserved to be arrested and punished; his story stirs little sympathy, much less outrage, in the crowd. The courts cannot be so impassive. We must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.
>
> > It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes of the Fourth Amendment.

Kopf, 993 F.2d at 379-80 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950)(Frankfurter, J., dissenting)).

not a "criminal." Even based upon Respondents' account, Petitioner was someone they suspected of stealing from a junkyard. At the time they sicced the dog on her, they had not even seen her and did not even know whether she fit the description of one of the men being sought. Indeed, no person the police use a police dog to subdue is a "criminal." At most the bitten are people the police may or may not have probable cause to detain or arrest.

Tennessee v. Garner does stand for the proposition that killing a fleeing non-threatening person was an inherently disproportionate use of force under the Fourth Amendment. However, as confirmed by other courts' adoption of the MPC definition since *Garner*, this Court did not suggest that only force likely to kill falls within *Garner's* prohibition.

The Ninth Circuit's suggestion that *only* force likely to *kill* is a "self-defeating way of apprehending a suspect" because it "guarantees that [the criminal justice] system will not be set in motion," *Vera Cruz*, Slip Op., at 12808 (citing *Garner*, 471 U.S. at 10), is simply wrong. It is self-defeating as well to, in effect, punish a suspect with a permanent, disfiguring injury before the criminal justice system can begin to pass judgment on guilt or innocence.

The line between force capable of causing death and that which is capable of causing serious bodily injury is not bright. The reason more persons do not die from police dog attacks is undoubtedly the availability of immediate medical attention summoned by police officers. Yet it would be wrong to say force is not likely to kill because of this fact. *People v. Hill*, 23 Cal.App.4th 1566, 1573-74, 28 Cal.Rptr.2d 783, 787 (1994) ("possibility of medical alleviation ought not be used to diminish one's culpability for infliction of an injury that would otherwise constitute mayhem"); *People v. Williams*, 46 Cal.App.4th 1767, 54 Cal.Rptr.2d 521 (1996) (possibility that victim's disfigurement might be alleviated through

reconstructive surgery is no bar to a finding of "permanent" injury); *Lamb v. Cree*, 466 P.2d 660, 663, 86 Nev. 179 (1970). The MPC definition recognizes this in using both kinds to define deadly force. While it is true that almost any use of force carries some theoretical risk of death, force which can cause serious bodily injury is by definition force that may have this consequence.

The Ninth Circuit also disregarded *Garner's* attention to relevant law enforcement policies and standards. The Model Penal Code's definition is embodied in the day to day practices and policies of law enforcement agencies across the country, as Petitioner's evidence demonstrated. The LAPD itself defines deadly force as that force which may result in serious injury or death. As this Court emphasized in *Garner, supra*, 471 U.S. at 19:

> Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing `unreasonable' if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted by legislation or departmental policy, rules similar to that announced today.

The Ninth Circuit's speculation on what might happen if police officers comply with their the definition of deadly force, *Vera Cruz* Slip Op., at 12708, is refuted by the police agencies' universal acceptance of the MPC definition.[10]

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[10] Accountability -- by making police adhere to a definition of deadly force that they themselves adopted -- is a good thing. After instituting restrictions on police discretion in shootings, the police reported

The Ninth Circuit speculates that *Garner* "may well have struck the balance differently" had it been faced with balancing the benefits of discouraging escape against a suspect's interest in freedom from disfiguring injury, rather than against a suspect's interest in his or her life. *Vera Cruz*, Slip op, at 12808. This assertion is unsupported by *Garner* itself, which did not hint at whether its analysis hinged on this distinction. The court fails to explain either how the logic of *Garner* supports the court's narrow interpretation of its holding, or why *Garner* would or could have relied on a definition of "deadly force" unknown in any jurisdiction at the time of its decision, and, aside from the court's decision, to this day. By speculating that *Garner* might have struck a different balance if it had been confronted with force causing only "serious

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> that as the number of persons shot and killed declined, the number of police officers killed in the line of duty also fell by half, from 131 in 1972 to 65 in 1990. . . . [I]t is also likely that restrictions on police shootings produced fewer shots in return. In short, restrictive shooting policies led to a general deescalation of violence and enhanced police officer safety.
>
> These data support the conclusion that administrative rules have successfully limited police shooting discretion, with positive results in terms of social policy. Fewer people are being shot and killed, racial disparities in shootings have been reduced, and police officers are in no greater danger because of these restrictions.

S. Walker, *Taming the System - The Control of Discretion in Criminal Justice 1950-1990*, 32 (1993). The Ninth Circuit has encouraged the police to "change" their deadly force definition, thereby loosening the rules, encouraging more police violence, and in return, more bullets that come back at the police.

bodily injury" as a basis for its decision, the court grossly undervalued the rights of ordinary people who may suffer often grotesque injuries of the kind presented in this case without the prophylactic effect of the *Garner* standard.

B. The Court Should Decide What Safeguards Should Apply Before The Police May Use A Dog to Mutilate A Person.

1. *Warnings.*

The Court should determine whether *warnings* should be required. This question has never been addressed by the Court, except where deadly force is used. It was not directly addressed by the Ninth Circuit majority. Judge Pregerson was of the opinion that, without a warning, causing a dog to attack Ms. Nunley was unreasonable excessive force.

No evidence was presented that any governmental interest was served by not warning Ms. Nunley. Ninety-nine percent of all felony suspects give up.

There is substantial authority supporting Judge Pregerson's view. *Tennessee v. Garner, supra,* 471 U.S. at 11 ("deadly force may be used if necessary to prevent escape, and if, where feasible, *some warning has been given.*"). "Given that both the individual's and the government's interest is better served if deadly force is avoided, it seems likely that the Supreme Court intended the warning requirement to be an *essential factor* in judging the constitutionality of the use of deadly force." *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1029 (D.C. Mass. 1985) (emph. added). "No matter how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method unreasonable." *Hammer v. Gross*, 932 F.2d 842, 852 (9th Cir. 1991) (Kozinski, concurring in part). "Giving

commands will often be sufficient to bring a suspect into custody. If a suspect appears violent, when possible, the officer should give verbal warning before resorting to any greater force." California Department of Justice, Commission on Peace Officer Standards and Training, *Basic Course Unit Guide 26, Legal Aspects of Force* 7 (1990). "Nothing cools a potentially violent situation more quickly than the sight of police canine." INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY # 238, *Police Dogs*. "It's much better," write Carl Sagan and Ann Druyan, to intimidate through "a vivid pantomime of what violence you will visit on the intruder should he persist in ignoring your restrained and reasonable warnings. Deterrence is the way these matters are arranged, by and large, on the planet Earth. Real violence lies at the extreme end of the spectrum of aggressive possibilities, a last resort, as Hobbes said." Carl Sagan, Ann Druyan, *Shadows of Forgotten Ancestors*, 189 (1992). "The law does not permit officers to make 'pre-emptive strikes' on the possibility that a person will prove dangerous, for that potential exists in every case." J. Hall, *Deadly Force in Defense of Life*, FBI LAW ENFORCEMENT BULLETIN at 30 (August, 1993). A "canine announcement should be mandatory in all cases, and be made in English and Spanish." James G. Kolts & Staff, *The Los Angeles County Sheriff's Department*, (July 1992), p. 86.

2. *Alternatives.*

The Court should decide whether *alternatives* should be considered in determining whether causing or permitting a dog to mutilate a person is reasonable.

The Ninth Circuit recognized that there is an conflict in the Ninth Circuit's cases regarding whether alternatives may be considered in determining whether force is reasonable. Apx. A-9. The Court should resolve this question. It seems obvious that determining reasonableness necessarily involves assessing

alternatives. The mere fact that police officers may not be *required* to use the least intrusive alternative does not mean that alternatives are irrelevant.

In deadly force cases, the Court has expressly required a consideration of alternatives. Deadly force may not be used unless it is *necessary*.[11]

The Ninth Circuit relies on *Illinois v. Lafayette*, 462 U.S. 640, 647, 77 L. Ed. 2d 65, 103 S. Ct. 2605 (1983) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12, 49 L. Ed. 2d 1116,

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[11] Under common law, deadly force, although used against a felon, was justified *only if* there were "'no other way the escaping felon can be taken.'" Conversely, "'if he may be taken in any case without [using deadly force],'" then deadly force was not justified. *Lamina v. State*, 46 Neb. 236, 64 N.W. 956, 957 (1895). The actor must "'reasonably believe[] that the arrest cannot otherwise be effected.'" *Martyn v. Donlin*, 151 Conn. 402, 198 A.2d 700, 706 (1964) (*quoting* RESTATEMENT, TORTS § 131(c)). *See also Reese v. City of Seattle*, 81 Wash.2d 374, 503 P.2d 64, 71 (1972) (Washington Supreme Court "emphasize[s]" that deadly force may "be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a lawful arrest have failed" [emphasis deleted].); *Murphy v. Murry*, 74 Cal. App. 726, 731, 241 P. 938 (1925) (same). Nearly 30 years ago the President's Commission on Law Enforcement made the same point: "Officers should not be permitted to [use deadly force] when lesser force could be used [or] when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189 (1967). Even the Tennessee law challenged in *Garner* limited deadly force to felons for whom "'no lesser means of apprehension reasonably appears available.'" *Garner v. Memphis Police Dept.*, 710 F.2d 240, 246 (6th Cir. 1983) (*quoting* brief of Tennessee Attorney General), *aff'd sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985).

96 S. Ct. 3074 (1976) for the proposition that it is not permissible to consider the availability of less intrusive alternatives. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Neither is a use of force case. In *Illinois v. Lafayette*, the question was whether it was permissible to search a person's bag when he was booked into jail. The Court did not hold that the existence of less intrusive alternatives was not to be considered. The Court held that the "reasonableness of any particular governmental activity does not *necessarily* or invariably turn on the existence of alternative 'less intrusive' means." 462 U.S. at 647 (emphasis added). *United States v. Martinez-Fuerte*, which involved a border search, provides even less support for the notion that, in determining whether mutilating a person with a dog is reasonable, a consideration of alternatives is not permissible.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner

MICHELLE LA NETTE NUNLEY,
Plaintiff - Appellant,
v.
CITY OF LOS ANGELES; DARYL GATES,
Defendants - Appellees.
NO. 95-560

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1997 U.S. App. LEXIS 19953

December 12, 1996, Argued and Submitted, Pasadena, California

July 31, 1997, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. DC NO. CV-89-03313-WJR(bx). William J. Rea, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For MICHELLE LA NETTE NUNLEY, Plaintiff - Appellant: Donald W. Cook, Esq., Robert Mann, Esq., Los Angeles, CA.

For DARYL GATES, Defendant - Appellee: Katherine J.

Hamilton, DCA, CITY OF LOS ANGELES OFFICE, Los Angeles, CA. For CITY OF LOS ANGELES, Defendant - Appellee: Katherine J. Hamilton, DCA, (See above).

JUDGES: Before: PREGERSON, D.W. NELSON, and O'SCANNLAIN, Circuit Judges. PREGERSON, Circuit Judge, concurring in part, and dissenting in part
OPINION: MEMORANDUM *

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

----------End Footnotes----------

Michelle La Nette Nunley seeks reversal of the district [*2] court's order denying her motion for judgment as a matter of law, following a jury trial, on her 42 U.S.C. @ 1983 claims against the City of Los Angeles and Los Angeles Police Department ("LAPD") Chief Daryl Gates (collectively, "the City"). Nunley argues that the evidence does not support the jury's conclusion that it was reasonable for LAPD officers to allow a police dog to bite her during a search for theft suspects. She further contends that there was insufficient evidence for the jury to find that the police officers lacked probable cause to arrest her. n1 In addition, she contests the following decisions made by the district court: the grant of summary judgment in favor of the City on her 42 U.S.C. § 1985(3) race discrimination claim, the exclusion of certain evidence, the refusal of her requests regarding several jury instructions, and the denial of her motions to strike testimony of one of the witnesses and to compel disclosure of tape-recorded statements made by that witness. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Nunley set forth several additional claims which are not at issue on appeal.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*3]

A motion for judgment as a matter of law is reviewed de novo. Acosta v. City & County of San Francisco, 83 F.3d 1143, 1145 (9th Cir.), cert. denied, 117 S. Ct. 514, 136 L. Ed. 2d 403 (1996). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. Id. We also review a grant of summary judgment de novo. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996).

Evidentiary rulings are reviewed for an abuse of discretion. Masson v. New Yorker Magazine, Inc., 85 F.3d 1394, 1399 (9th Cir. 1996). Jury instructions are also reviewed for an abuse of discretion. Fikes v. Cleghorn, 47 F.3d 1011, 1013 (9th Cir. 1995). Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. Id.

I. Excessive Force

While we consider this to be a close question, we conclude that there was sufficient evidence for the jury to find that Officer Doug Roller's use of the dog was reasonable. See Graham [*4] v. Connor, 490 U.S. 386, 388, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1981) (holding that police officer's use of force is evaluated for reasonableness under the Fourth Amendment); see also Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994) (noting that reasonableness is ordinarily a question of fact for the jury to

decide). The officers were searching for suspects in a scrap metal yard after dark, and had reason to believe that a felony was being committed. Several officers testified that they feared for their safety. Although Roller did not announce that his dog Keno was likely to bite, he announced his presence several times, giving Nunley the opportunity to surrender. Keno's engagement with Nunley lasted for merely a few seconds, and she sustained only moderate injuries to her leg. Moreover, in a comparable case involving the use of an LAPD dog to search for a suspect hiding in a scrap metal yard, we concluded that the reasonableness of the force used was a question for the jury to decide. See Chew, 27 F.3d at 1443 (reversing summary judgment). Under these circumstances, we conclude that it was rational for the jury to determine that Roller's use of Keno was reasonable. [*5]

We also conclude that we need not analyze the case under the standard applicable to deadly force. Tennessee v. Garner, 471 U.S. 1, 11-12, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1984); Quintanilla v. City of Downey, 84 F.3d 353, 357 (9th Cir. 1996). The jury here was instructed on the deadly force standard. Without minimizing the severity of the injuries that Keno was capable of inflicting, we conclude that the risk of death or serious bodily harm was not so substantial that, as a matter of law, we must view the case as one involving the use of deadly force. We therefore affirm the district court's decision on this claim.

II. Probable Cause

The evidence also supports the jury's conclusion that the LAPD officers had probable cause to arrest Nunley. A scrap yard employee reported that "about two" men were stealing metal from the yard, and officers arriving on the scene observed two suspects fleeing. It is not clear from the record whether Nunley was arrested before the two male suspects had surrendered. Even assuming that both already had surrendered, the evidence would

have supported a conclusion that it was reasonable for the officers to believe that more than two individuals [*6] were involved in the suspected crime.

Nunley's argument that the arresting officers lacked the authority to arrest her is misplaced. Nunley contends that her arrest was improper because the officers failed to witness the alleged theft, and because it was only reasonable for them to believe that petty theft, a misdemeanor, had occurred. Under California law, an officer may arrest a person suspected of a misdemeanor only if the officer has reasonable cause to believe that person has committed a misdemeanor in the officer's presence. See California Penal Code § 836. Yet contrary to Nunley's assertions, evidence in the record could have supported a conclusion that the officers reasonably believed a felony had been committed. Nunley mistakenly insists that by announcing the suspected theft as a "484 theft," see California Penal Code § 484, the LAPD signified that the theft in question was petty. Nunley neglects to acknowledge that Section 484 also includes a prohibition of felonious theft. We affirm the district court's decision denying Nunley's motion for judgment as a matter of law on this claim.

III. Nunley's § 1985(3) Race Discrimination Claim

The district court [*7] granted summary judgment in the City's favor on Nunley's § 1985(3) claim. To succeed on a claim under § 1985(3), Nunley must allege and prove: (1) a conspiracy; (2) for the purpose of depriving her, either directly or indirectly, of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) whereby she is injured in person. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citing United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 828-29, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983)).

Nunley has not offered sufficient evidence to create a genuine

issue of material fact as to the existence of a conspiracy. To show a conspiracy, Nunley had to offer evidence of an agreement or "meeting of the minds" to violate her constitutional rights. Ward v. Equal Employment Opportunity Comm'n, 719 F.2d 311, 314 (9th Cir. 1983). Although a conspiracy may be inferred from conduct and need not be proved by evidence of an express agreement, see id., Nunley's failure to point to any facts or conduct probative of a conspiracy entitled the City to summary judgment on her § 1985(3) claim.

We reject Nunley's argument that the district [*8] court erred in construing the motion to dismiss the § 1985(3) claim as a motion for summary judgment. Although the district court initially construed defendants' motion to dismiss as a summary judgment motion, the court denied the motion at that stage. The court ultimately granted summary judgment on the § 1985(3) claim on its own motion at the beginning of the trial.

The district court clearly possesses the authority to grant summary judgment on its own motion, if the parties receive adequate notice to bring forward their evidence. See, e.g., Fuller v. City of Oakland, 47 F.3d 1522, 1533 (9th Cir. 1995). Nunley's contention that she did not have an adequate opportunity to point to facts that could convince a rational jury of her claim is irrelevant where, as here, the case had already proceeded to trial. The district court had allowed her to present evidence of race discrimination at the first trial, and concluded, on the eve of the second, that this evidence was insufficient as a matter of law. For these reasons, we affirm the district court's decision to grant summary judgment in favor of the City on this claim.

IV. Evidentiary Rulings

Nunley contests the district [*9] court's exclusion of certain evidence. The Christopher Commission Report, the photographs of injuries inflicted by police dogs other than Keno, the photographs of injuries caused by Keno after the Nunley incident, and the LAPD "Why Be a Cop" video are relevant only to the question of the constitutionality of the City's police dog policy. Because we need not reach this question, we need not consider whether the district court abused its discretion in excluding this evidence.

V. Jury Instructions

Nunley argues that the trial court improperly denied her requests for a number of jury instructions. With respect to Nunley's proposed instructions that a dog may be considered a deadly weapon and that a police dog is an extension of the officer who controls him, along with her proposed instructions on probable cause, the instructions that were actually given sufficiently covered the case so that a jury could intelligently determine the questions presented. See Investment Serv. Co. v. Allied Equities Corp., 519 F.2d 508, 511 (9th Cir. 1975). The district court therefore did not abuse its discretion in refusing to give these instructions.

Nunley further requested that the court [*10] give an instruction that matched the language of Fed. R. Evid. 406, which states that "the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Nunley argues that the jury should have been allowed to rely on this rule to infer, based on evidence that the LAPD maintained a policy of not warning suspects that officers were present, that Officer Roller did not announce his presence to Nunley. Even assuming the jury may draw an

inference about an individual's behavior from the routine practice of an organization, compare United States v. Newman, 982 F.2d 665, 669 (1st Cir. 1992) (indicating that the routine practice of an organization, without more, is not probative of the conduct of a particular individual within the organization); United States v. Angelilli, 660 F.2d 23, 41 (2d Cir. 1981) (same), there was insufficient evidence here of regular LAPD practice to support a conclusion about Roller's actions. Denial of the instruction, therefore, was not an abuse of discretion. The additional instructions which the district [*11] court refused to give and which Nunley contests were not applicable to this case.

We also reject Nunley's arguments that the district court abused its discretion in giving certain jury instructions. First, Nunley contends that the district court erred in instructing the jury that a person who flees and hides from the police is actively resisting arrest. A conclusion that Nunley was "fleeing or actively resisting arrest" would have been reasonable in this case. Moreover, the jury was not required to consider this specific factor in assessing the reasonableness of Roller's actions. See Fikes, 47 F.3d at 1014. Thus, even if the instruction was erroneous, it was not prejudicial.

Nunley also argues that the district court erred in instructing the jury that "in determining the reasonableness of police officers' conduct, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives." Although our decisions in Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989), and Hopkins v. Andaya, 958 F.2d 881, 887 (9th Cir. 1992), contain language to the contrary, the instruction that was given does find support in Ninth Circuit [*12] law. In Scott v. Heinrich, a deadly force case, we determined that "as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them." 39 F.3d 912, 915

(9th Cir. 1994). Similarly, in a case assessing the reasonableness of police officers' use of force that was not deadly, we stated that "police officers . . . are not required to use the least intrusive degree of force possible." Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994). Therefore, the instruction that was given cannot be said to be erroneous.

The district court also did not abuse its discretion in giving the instruction on reasonable detention. The jury was instructed on the elements required for a reasonable arrest. There is no reason to suppose, as Nunley argues, that the jury did not rely on these arrest instructions in evaluating whether the LAPD properly arrested her, regardless of whether the jury believed the officers may have detained her before they actually arrested her.

Finally, Nunley disputes the district court's decision to instruct the jury that "reasonable cause may be [*13] based on collective knowledge of all officers involved in the investigation, and all reasonable inferences that may be drawn therefrom." Nunley argues that the instruction "circumvents the rule that the officer who makes the arrest must have knowledge of the facts justifying probable cause." However, there is ample evidence in the record that the arresting officer, Officer Churchill, knew of facts that would have supported a finding that he had probable cause to arrest Nunley. Nunley therefore has not shown that the instruction, even if erroneous, was prejudicial. The district court did not abuse its discretion in denying the instruction.

VI. Testimony of George Walker

The district court did not abuse its discretion in denying Nunley's motion to strike the testimony of George Walker, one of the suspects found at the scrap yard and arrested along with Nunley. Nunley contends that the City violated Fed. R. Civ. P. 26 by refusing to provide her with information about Walker's address in a timely fashion. Under the current version of the Rule,

the key issue is whether the City disclosed Walker's address within an "appropriate interval." Fed. R. Civ. P. 26(e) (1996) (amended in [*14] 1993). Under the prior version, the inquiry would be whether the City "reasonably" supplemented its response to discovery requests. Fed. R. Civ. P. 26(e) (prior version). We need not decide which version is applicable here, because under either version, the district court did not abuse its discretion in refusing to strike the testimony.

Nunley asserts that City attorneys learned of the address in March 1992, but neglected to inform Nunley until November 1992, a delay of approximately eight months. Even if this is the case, it is undisputed that Nunley contacted Walker in advance of trial, and she has provided no evidence that she sought to depose him or that she requested a continuance in order to prepare for his testimony either prior to the trial or after trial had commenced. Moreover, this is not a case where the party seeking relief was denied an opportunity to rebut testimony at trial. See Mawby v. United States, 999 F.2d 1252, 1254 (8th Cir. 1993) (reversing trial court's decision to bar appellant from rebutting surprise evidence). We therefore conclude that the district court did not err in denying the motion to strike Walker's testimony.

We also conclude that the trial [*15] court did not err in refusing to order the City to turn over tape-recorded statements made by Walker to counsel for the City. Nunley claims that she was entitled to obtain the statements, even though the district court determined that they contained privileged material in the form of attorneys' thought processes. See Fed. R. Civ. P. 26(b)(3). Nunley asserts that she had "substantial need" of them and was "unable without undue hardship to obtain the substantial equivalent" of the tapes "by other means." See id. Yet Nunley first requested that the City turn over the tapes on January 21, 1993, long after the trial

had commenced. The court reviewed the tapes and determined that there was no substantial difference between Walker's trial testimony and his statements. Nunley therefore has not demonstrated why she was unable to obtain the substantial equivalent of the tapes, when she was able to rely on Walker's testimony in preparing for cross-examination. We thus conclude that the district court did not err in refusing to compel the City to turn over the tapes.

CONCLUSION

For the foregoing reasons, the district court's decision is AFFIRMED.

CONCURBY: PREGERSON (In Part)

DISSENTBY: PREGERSON [*16] (In Part)

DISSENT:

PREGERSON, Circuit Judge, concurring in part, and dissenting in part:

I respectfully dissent with respect to the excessive force claim. Nunley was an unarmed, nonviolent theft suspect. I submit that the LAPD's failure to warn her that a dog would be released to seize and bite her if she failed to surrender constitutes an unreasonable use of excessive force.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE LA NETTE NUNLEY,

Plaintiff-Appellant,

v.

LOS ANGELES CITY; DARYL GATES; GREEN, Officer; CHURCHILL,

Defendants-Appellees.

FILED
SEP 11 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 95-56090
D.C. No. CV 89-03313-WJR
ORDER

Before: PREGERSON, D.W. NELSON and O'SCANNLAIN, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Pregerson and O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P.35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

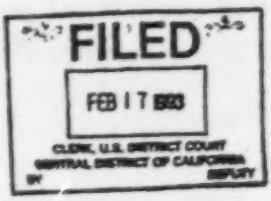
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHELLE LA NETTE NUNLEY,

Plaintiff,

vs.

CITY OF LOS ANGELES, et al.,



Defendants.

Case No. CV 89-3313 WJR (Bx)

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on January 5, 1993, in Courtroom 10 of the above entitled Court, the Honorable William J. Rea, Judge presiding; the plaintiff appearing by attorneys Donald W. Cook and Robert Mann and the defendants appearing by Deputy City Attorney Debra L. Gonzales.

A jury of eight persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury which said verdict was in words and figures as follows, to -wit:

SPECIAL VERDICT

We, the jury in the above entitled case, find the following special verdict on the questions submitted to us:

Question No. 1. Did any Los Angeles police officer violate Michelle La Nette Nunley's constitutional rights by using excessive

force against her on December 18, 1988?

Answer "yes" or "no"

Answer: No

If you answer "yes" to Question No. 1, then answer Question No. 2.

If you answer "no" to Question No. 1, then answer Question No. 10.

Question No. 10. Did any Los Angeles police officer violate plaintiff Michelle La Nette Nunley's constitutional rights by being deliberately indifferent to her serious injuries, if any, she sustained on December 18, 1988?

Answer "yes or "no"

Answer: No.

If you answer "yes" to Question No. 10, then answer Question No. 11.

If you answer "no" to Question No. 10, then answer Question No. 14.

Question No. 14. Did any Los Angeles police officer falsely arrest plaintiff Michelle La Nette Nunley on December 18, 1988?

Answer "yes" or "no"

Answer: No.

If you answer "yes" to Question No. 14, then answer Question No. 15.

If you answer "no" to Question No. 14, sign and return this verdict.

DATED: February 5, 1993

ROBERT FINN

Foreperson

It appearing that by reason of said special verdict:

Defendants CITY OF LOS ANGELES and DARYL F. GATES are entitled to judgment that plaintiff MICHELLE LA NETTE NUNLEY take nothing.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That defendants CITY OF LOS ANGELES and DARYL F. GATES have judgment that plaintiff MICHELLE LA NETTE NUNLEY take nothing.

DATED: 02-17-93

WILLIAM J. REA
Judge of the United States
District Court